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NO. 86-378

UNITED STATES SUPREME COURT

October Term, 1986

PLANNED PARENTHOOD OF CENTRAL AND NORTHERN ARIZONA, an Arizona nonprofit corporation; PLANNED PARENTHOOD OF SOUTHERN ARIZONA, an Arizona nonprofit corporation; and JACK BASHAW, M.D., Cross-Appellants,

v.

BRUCE E. BABBITT, Governor of the State of Arizona; DOUGLAS PATINO, Director of the Department of Economic Security; and ROBERT K. CORBIN, Attorney General of the State of Arizona, Cross-Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO MOTION TO DISMISS OR AFFIRM

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18 pp

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ARGUMENT

I. PLANNED PARENTHOOD'S RIGHT TO RAISE CERTAIN ISSUES ON ITS CROSS-APPEAL IS INTACT.

Contrary to the State's assertion, Planned Parenthood clearly assailed the footnote at issue -- in all of its aspects -- below. In the district court, Planned Parenthood contended that both paragraphs of the footnote were unconstitutional, for a multitude of reasons.* The district court found that on at least two grounds -- free speech and vagueness -- both paragraphs of the footnote were unconstitutional. Planned Parenthood v. Arizona, 537 F.Supp. 90 (D. Ariz. 1982)

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* In addition to the free speech and vagueness claims, Planned Parenthood asserted that the entire footnote was unconstitutional on these additional grounds: violation of the Supremacy Clause; violation of privacy rights; violation of Equal Protection Clause; violation of Privileges and Immunities Clause.

(see Appendix D to Planned Parenthood's Jurisdictional Statement).

On the State's appeal from this determination, and consistent with our position in the district court, Planned Parenthood argued that the district court had correctly found both paragraphs of the footnote to be unconstitutional. The issue of whether it was proper for the Ninth Circuit in Planned Parenthood I (Planned Parenthood v. Arizona, 718 F.2d 939 (9th Cir. 1983)) to have reversed the district court's determination regarding the first paragraph of the footnote was never conceded by Planned Parenthood. The State's contention to the contrary is demonstrably incorrect.

First. Planned Parenthood has never taken the position that the State may use its fiscal muscle in derogation of Planned Parenthood's constitutional

rights. At page 4 of its Motion to Dismiss or Affirm, the State badly mischaracterizes Planned Parenthood's argument to the Court of Appeals in Planned Parenthood I. Consistent with this Court's decisions in cases such as Maher v. Roe, 432 U.S. 464 (1977), Planned Parenthood recognized that the State could not be required to fund family planning services. But Planned Parenthood also contended -- consistent with Maher -- that once a state decides to fund family planning services, it must do so subject to constitutional limitations, and that a law which made funding dependent on the content of speech was patently unconstitutional. See Planned Parenthood's brief to Ninth Circuit in Planned Parenthood I, at p. 25 (Appendix A hereto).

The State's limited, out-of-context excerpting of Planned Parenthood's

Ninth Circuit brief neglects to reflect this important aspect of Planned Parenthood's argument.

Second. The State argues that Planned Parenthood somehow "waived" its right to challenge Planned Parenthood I by failing to file a petition for certiorari from that determination. In fact, it is clear that it would have been procedurally inappropriate for Planned Parenthood to have filed such a petition at that time. The Court of Appeals in Planned Parenthood I reversed and remanded the case, instructing the district court to resolve an issue of fact. The remand thus required the district court's further substantive participation in the case; that is, the remand was not one requiring the performance of a mere ministerial act by the district court. Under these circumstances, it is clear that Planned Parenthood could not then have petitioned for

certiorari. See for example, Earle v. Myers, 207 U.S. 244 (1907), where this Court held that where a court of appeals reverses a district court determination and remands the case for further substantive proceedings in conformity with the appellate court's opinion, that opinion is not final -- and thus not subject to Supreme Court review.*

Third. The State also contends that Planned Parenthood's decision not to seek reconsideration of Planned Parenthood I bars consideration of the speech issue (as it relates to the first paragraph of the footnote) by this Court. Not

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* Compare, Chicago v. Atchison, Topeka & Santa Fe R. Co., 357 U.S. 77 (1958); and Moore v. New York Cotton Exchange, 270 U.S. 593 (1925). In both of these cases, this Court held that where the duties imposed on the trial court by the court of appeals are merely ministerial, the order is considered final for purposes of appeal to the Supreme Court.

only does the State fail to provide any case support for this proposition, but the argument, as well, is squarely at odds with the State's position that it may raise the Hatch Act argument in its appeal. While, as the State concedes in its Jurisdictional Statement, at p. 12, n. 2, the court of appeals rejected its Hatch Act argument, the State never -- neither after the court of appeals' ruling in Planned Parenthood I, nor after its ruling in Planned Parenthood II (Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986)) -- sought reconsideration of this determination. Indeed, the State did not seek reconsideration of any aspect of the Planned Parenthood II decision, although that decision is the court of appeals decision which the State has now asked this Court to review. See, State's Jurisdictional Statement, at p. 2 ("This appeal

is taken from a judgment dated May 15, 1986, of the Court of Appeals for the Ninth Circuit . . .").*

In sum, Planned Parenthood has not "expressly waived or conceded" the issues raised in its conditional cross-appeal. The cases cited by the State at page 5 of its Motion are therefore inapposite. In addition, Planned Parenthood expressly contended -- in both the district court and the court of appeals -- that both paragraphs of the footnote were unconstitutional. The State's argument to the contrary is meritless, and the cases it cites at page 6 of its Motion are also inapposite.

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* The State contends (at p. 3 of its Motion) that Planned Parenthood is appealing the decision in Planned Parenthood I, not Planned Parenthood II. In making this argument, the State overlooks the fact that its appeal is, at its essence, founded upon the issues it raised in Planned Parenthood I.

II. THE INTERPRETATION GIVEN TO THE LEGISLATION BY THE ARIZONA ATTORNEY GENERAL DOES NOT CURE THE STATUTE'S VAGUENESS.

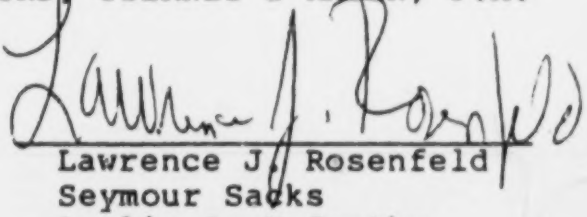
Finally, the State's contention that an opinion issued by the Arizona Attorney General "resolves" the vagueness issue (See Section III of Planned Parenthood's Jurisdictional Statement) does not withstand scrutiny. Arizona Attorney General opinions do not have the force of law, are advisory only, and are not binding on the courts. See, Marston's, Inc. v. Roman Catholic Church, 132 Ariz. 90, 644 P.2d 244 (1982); State v. Toulouse, 122 Ariz. 275, 594 P.2d 529 (1979); State v. Deddens, 112 Ariz. 425, 542 P.2d 1124 (1975). See also, Arizona Op. Att'y General No. I 78-283 (R 78-310), p. 2, December 21, 1978 (opinions of the Attorney General are advisory only, are not binding on courts of law, and are not a legal determination of what the law

is at any certain time). Likewise, the Supreme Court has ruled that it is not bound by the United States Attorney General's opinions regarding the interpretation of statutes or treaties; see, Perkins v. Elg, 307 U.S. 325, 349 (1939).

III. CONCLUSION

For all of the foregoing reasons, Planned Parenthood respectfully requests that the State's Motion to Dismiss or Affirm be denied.

SACKS, TIERNEY & KASEN, P.A.

By 

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Appendix A

Brief of Planned Parenthood to United States Court of Appeals for the Ninth Circuit, No. 82-5437 (718 F.2d 938 (9th Cir. 1983)), at p. 25

APPENDIX A

Thus, the fact of lack of even-handed application significantly distinguishes this case from Letter Carriers, Broadrick, and Buckley v. Valeo, 424 U.S. 1 (1976). For, in contrast to our situation, none of those cases involved the imposition of a prohibition or restriction based upon one's particular point of view. None of those cases restricted the constitutional rights only of those federal employees who espoused a particular political point of view, or provided campaign funding only to those political parties taking a favorable stance on a particular issue. The prohibitions and restrictions were applied completely independently of any such consideration -- as the courts in each of those cases indicated must necessarily be the case in

order for the law to survive constitutional scrutiny. Those cases thus stand not as support for the State's position, but in stark contrast thereto.